

CONCESSIONS IN COSTA RICA: BACKGROUND AND EVOLUTION DIFFICULTIES AND A PROPOSAL

Lic. Alexandra Cerdas Pérez
Legal Director
National Concessions Council

March 2012

Importance of Concessions

- ♦ Allows for a faster development of the national infrastructure with positive effects on:
 - ♦ The quality of life of the citizens
 - ♦ Competitiveness in various sectors of the economy
 - ♦ Attracting investment and new technology
 - ♦ The development of new areas of the country

Background and Evolution of Concessions

- ♦ Previous 1993 and 1994 Laws
- ♦ 1998 Legal Reform (Law N° 7762)
 - ♦ Concessions in Costa Rica began at a regulation level
 - ♦ Creation of the National Concessions Council (Resources)
 - ♦ Ambitious portfolio of projects and initiatives
 - ♦ Lack of experience by the principal actors
 - ♦ Lack of political consensus on the usefulness of the concessions model
- ♦ 2008 partial reform to LGCOSP (Law N° 8643)

Other Laws that Govern Concessions

- ♦ Public Budgets Law (N° 8131)
- ♦ Public Administration Law
- ♦ General Administrative Contracting/Procurement Law
- ♦ Internal Control Law (N° 8292)
- ♦ Corruption and Illicit Enrichment Law (N° 8422)
- ♦ ARESEP's Law
- ♦ SETENA's Law
- ♦ Conflict Resolution Law (N° 7722)
- ♦ among others

Sectors Where Concessions May Apply

- ♦ Transport (roads, railroads, urban transit)
- ♦ Ports and airports
- ♦ Public education infrastructure (teaching excluded)
- ♦ Aqueducts and liquid waste treatment
- ♦ Management and treatment of solid waste
- ♦ Public buildings (e.g. MEP)
- ♦ Housing (after modifications to Law N° 7052)
- ♦ Alternative Energy (e.g. hydrogen powered vehicles)

National Concessions Council

- ♦ Council is made up of heads of
 - ♦ MOPT, Finance Ministry, MIDEPLAN, BCCR, and
 - ♦ 3 representatives from industry (Guilds and Professional Associations)
- ♦ Is created with an weak institutional structure
- ♦ Needs:
 - ♦ Personnel experienced in the different phases of concession projects
 - ♦ Technical skill in managing the concession processes

CNC Track Record

- ♦ 3 concession contracts countersigned by CGR
- ♦ 2 projects built and placed in service



SJ-Caldera
Toll Road



Liberia Airport

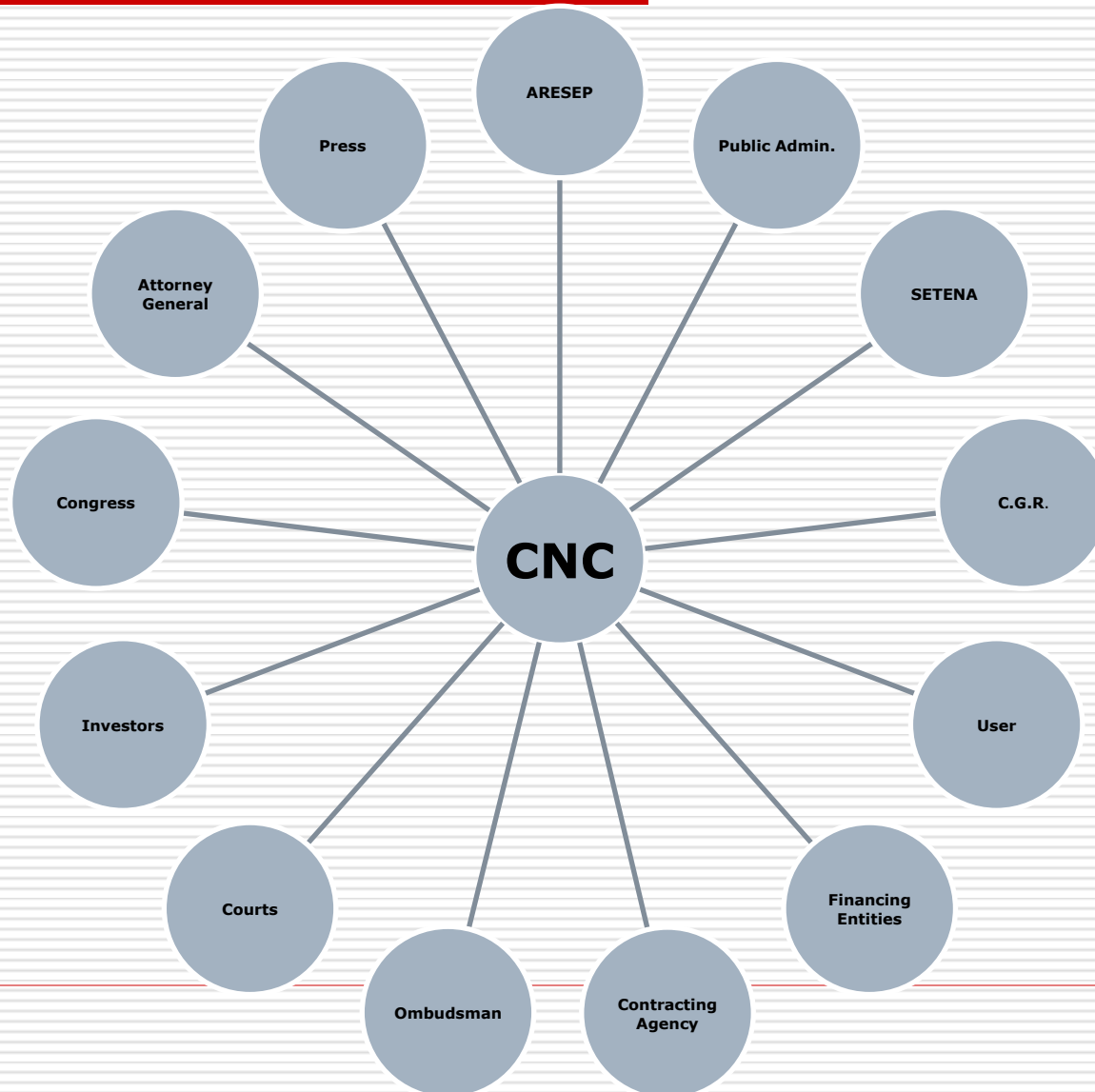
14 years after the approval of the Concessions
Law

**¿Why have only 2 projects been built
and placed in service?**



DIFFICULTIES

Players in the Concessions Process



Difficulties in Coordinating the Public Sector

- ♦ Lack of planning and strategic decision-making based on clear and long term policies
- ♦ Comptroller General – does not participate ex-ante
- ♦ Inexperience of Civil courts and specialized technical arbitration experts in settling complex conflicts that arise from concession contracts
- ♦ “Red Tape”: Contracts negotiated in multiple phases, delays
- ♦ Absence of binding force in CNC’s decisions

Difficulties in the Organization and Management of CNC

- ♦ Separate operating unit of the MOPT
- ♦ Operates in the name of the entire Executive Power
- ♦ Depends on third parties and their resources for effective action
- ♦ Absence of a team with experience in the different phases of concessions
- ♦ Lack of budget for contracting expert consultants
- ♦ CNC's decisions carry no weight

Learning Difficulties

- ♦ Normal and necessary learning curve
- ♦ Project final designs impacted by the processes for obtaining the rights of way, expropriations, human resettlement, public service relocation (a long and complicated process)
- ♦ Inability to understand market conditions sufficiently to craft more competitive offerings
- ♦ Inadequate feasibility studies (e.g. environmental, etc.)
- ♦ Little or no procedures for project management and control

Difficulties in Project Structuring and Design

- ♦ Project risks are not well defined and/or or risks are improperly allocated among the parties
- ♦ Tendency to solve in one project other infrastructure issues
- ♦ Projects unattractive or insufficiently profitable for investors and banks
 - ♦ Few bidders (or sole bidder) – no competition
 - ♦ Poor or inadequate publicity for tenders
 - ♦ Difficulty in reaching financial close

Difficulties due to Contract Inflexibility

- ♦ Concessions are more like public procurements
- ♦ Not a real partnership between the Public and Private sectors (PPP)
- ♦ Other PPP features are excluded
 - ♦ Management services contracts
 - ♦ Government equity participation
 - ♦ Flexible tariff structures (e.g. “shadow tolls”)
 - ♦ Leasing
 - ♦ Etc.

Reality

- ♦ Lack of consensus at the national political and societal levels that the concession model should be used
- ♦ Public officials have little or inadequate institutional and political support
 - ♦ Fear of making decisions
- ♦ Public officials at risk for administrative, civil, criminal penalties:
 - ♦ Public officials stick to what is regulated
 - ♦ Inability to respond to unforeseen circumstances
- ♦ Lack of flexibility and versatility in the application of a legal framework
- ♦ Discouragement and frustration of concessionaires

Conclusions

- ♦ The PPP concept can work in the Costa Rican setting
- ♦ The need for PPPs projects is greater than ever before
- ♦ Political, institutional and management factors have prevented more successful outcomes
- ♦ There has been, however, important experience gained from the projects that have been carried out
- ♦ Important adjustments are required to the legal and institutional framework in order to guarantee the best results in the use of this contracting vehicle
- ♦ Expert, experienced teams are required, with independence of judgment and sufficient economic resources for project management and control



A PROPOSAL

Legal Framework

- ♦ There is a specific legal framework for PPP structures, but it lacks some PPP features
- ♦ Relevant legal expertise is developed through the contract award & management processes
- ♦ Reforms need to be based on practical experience
- ♦ We need a substantive debate and to reach political consensus

What to do to Improve?

- ♦ Achieve political consensus
 - ♦ On the need for and usefulness of the PPP tool
 - ♦ Transparency and competition in the award processes
 - ♦ Proper technical justification for concession processes (sector or master studies-plans)
 - ♦ Specialized Supervision and Control procedures
- ♦ Reform of the legal framework
- ♦ More and better interaction between CNC and potential bidders, banks, risk rating agencies etc., with the objective of structuring projects that are attractive to private investment and meet public needs and interests

Goals for Improving the Concession Process

- ♦ Affirm the principles of transparency and fair competition in awarding of these long term, highly important projects
- ♦ Improve qualified bidder's access to economic, technical, financial and commercial information in order to create competition and private investment
- ♦ Award executable Concession Contracts – not just a contract that will later be discussed or restructured or renegotiated
- ♦ Understand the dynamics of APP's as a long term, eminently financial contract
- ♦ Carry out new projects and resolve controversies that arise from the evolution of the economy, society, technology, and best practices

Proposal for Reform

- ♦ Major reform of Law 7762 LGCOPSP
 - ♦ Review certain aspects of CNCs organization, structure and management charter
 - ♦ Clarify CNC authority (e.g. Declaration of Public Interest)
 - ♦ Clearly define the Contracting Agency of the government
 - ♦ Clarify CNC's rules of engagement
 - ♦ (vis. Comptroller General – during RFP and contract award)
- ♦ Timely and proper coordination and participation with Comptroller General and regulatory agencies
- ♦ Ex-ante participation from ARESEP and the Comptroller General: from the beginning of the RFP

Proposal for Reform

- ♦ Establish a culture and an organization suited to the challenges:
 - ♦ Highly specialized teams
 - ♦ Equals to their counterparts from the concessionaire
 - ♦ CNC financial autonomy
 - ♦ A meaningful National Concessions Fund
- ♦ Create an Expropriations Fund
- ♦ Obtain rights of way in a timely, efficient, effective manner
- ♦ Include other PPP structures, besides Concessions:
 - ♦ Shares participations
 - ♦ Flexible tariff schemes (“shadow tolls”)
 - ♦ Service contracts
- ♦ Ensure better project management and controls

Proposal for Reform

- ♦ Promote innovative financing models
 - ♦ Syndicated national commercial bank financing, example: Construction phase financing
 - ♦ Equity participation in project cash flows
 - ♦ Risk Rating Agencies: Allows pension & insurance funds to invest in bonds from investment grade concessionaires

Ten Commandments for the Sustainability of Private Party Participation in Infrastructure

1. You will get commitment from the government and political consensus from the political forces that have majority in Congress.
2. You will inform the public about the process, its advantages and costs.
3. You will develop the participation in a complete and flexible legal framework, with clear and transparent playing rules.
4. You will carry out the award process without short-cuts of any phase and will select the most qualified group for construction, operation and financing.
5. You will put the best public officials in regulatory agencies, you will give them freedom of action in the government and the private sector and will give them capabilities comparable to the private sector.
6. You will commit yourself and the private sector to the success of the operation.
7. You will not confuse social objectives with commercial ones.
8. You will distribute costs and benefits fairly.
9. You will give the private sector the necessary incentives for their participation, but only the necessary ones.
10. You will not allow the project risk mitigation processes to limit broad participation interest.



THANK YOU

Lic. Alexandra Cerdas Pérez
Directora Jurídica
Consejo Nacional de Concesiones

Marzo 2012